CF0000057434

02

Single Bench (Criminal)

IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

Cr.Appeal No.368 OF 1990.

2597

APPELLANT (IN JAIL): Bhushan son of Narayan Nai aged 29 years, R/o village-Marod Police Station Kurud District Raipur.

30-4-90
Vijay Pandey
Advocate
30-3-90

-Versus-

Respondent: State of Madhya Pradesh

CRIMINAL APPEAL U/S 374(2) Cr.P.C.

(25) AFR

XI-HC-78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

**मामला क्रमांक** ...C.A.-368/90 **सन्** **200**

**आदेश पत्रक (पूर्वानुबद्ध)**

| आदेश का दिनांक तथा आदेश क्रमांक | हस्ताक्षर सहित आदेश | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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**25.01.2007**

Shri Janak Ram Verma and Shri C.R. Sahu, Counsel for the appellant.

Shri Sandeep Yadav, Dy. Govt. Advocate for the State.

Arguments heard.

Judgment passed as follows :

**ORAL JUDGMENT**
**(25.01.2007)**

**SUNIL KUMAR SINHA, J.**

This appeal is directed against the judgment of conviction and order of sentence dated 23/3/1990 in Sessions Trial No.55/89, whereby, the accused/appellant was convicted under Section 376 of IPC and was sentenced to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.1000/-, in default of payment of fine to further undergo R.I. for 4 months.

The case of the prosecution is that the prosecutrix namely Ku. Ashwani Bai, a minor girl aged about 13 years, was playing near her house at about 12 - 1'O Clock in the noon. Her parents were not present at that time. The appellant, who is the neighbour of the prosecutrix,came over there, took her to a *Kotha* (a place where the straw etc are kept), got her lie on the straw and committed sexual intercourse against her. When the father of the prosecutrix came to the house in the evening, the prosecutrix

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reported the matter to him and thereafter, the prosecutrix, her father and other villagers went to the Police Station and lodged a complaint. Firstly, the complaint of the prosecutrix was recorded in *Roznamchasana* (Daily Diary) of the Police Station at No.661 vide Ex.P/11 and thereafter, she was sent for medical examination under the memo (Ex.P/7). Her medical examination was conducted by Dr. (Smt.) M. Purohit (PW-10), who prepared her report (Ex.P/9). After receiving the medical report by the Police, a First Information Report (Ex.P/12) was registered in the Police Station under Section 376, 354 and 511 of IPC against the appellant and the investigation commenced. The Investigation Officer prepared the site plan (Ex.P/6) and he also seized underwear of the prosecutrix and the statements of the witnesses were recorded. During the course of investigation, the accused/appellant was taken into custody and was sent for medical examination and his medical report (Ex.P/3A) was prepared. The underwear, hairs and slides sent by the hospital marked as Article A, B & C were sent to the State Forensic Science Laboratory, Sagar, for their chemical examination, on which, the report (Ex.-P/5-B) was received from the said authority, according to which, Semen etc was not found on these articles sent for chemical examination.

The charge sheet was filed under Section 376 of IPC before the Judicial Magistrate First Class- Dhamtari, who in turn committed the case to the Court of Sessions on 31/1/1989, wherefrom, the case was received on transfer in the Court of

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Second Additional Sessions Judge, Raipur, who conducted the trial.

The learned Additional Sessions Judge framed charges under Section 376 of IPC, to which, the appellant denied.

The prosecution in order to establish their case examined as many as 11 prosecution witnesses. Thereafter, the examination of the accused/appellant was recorded under Section 313 of Cr.P.C. and the defence also produced 2 witnesses.

The learned Additional Sessions Judge after hearing the arguments of both the parties held the appellant guilty of the offence punishable under Section 376 of IPC and sentenced him as aforementioned.

The conviction of the appellant is based upon the sole testimony of the prosecutrix, which has been held to be corroborated by the First Information Report as well as evidence of the father of prosecutrix namely Lakhansingh (PW-2).

Learned counsel for the appellant argue that the sole testimony of the prosecutrix is not fully reliable, as it does not inspires confidence and her version does not appears to be natural and truthful. They also argue that the version of the prosecutrix is exaggerated and is not supported by the version of her father and the First Information Report as well as medical evidence and the trial Court committed an error of law by holding that her

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version was supported by above evidence and the conviction based upon the said material deserves to be set aside.

On the other hand, learned counsel for the State opposes these arguments and supports the judgment of conviction and order of sentence passed by the trial Court.

I have heard learned counsel for the parties at length and have also perused the records of Sessions Trial.

In the matter of ***Dilip and another vs. State of M.P.*** reported in ***(2001) 9 S.C.C. 452***, the Apex Court held that it is well settled that the sole testimony of the prosecutrix can be acted upon and made the basis of conviction without being corroborated in material particulars. However, the rule about the admissibility of corroboration should not be ignored by the Courts in sexual offences. The Apex Court also held in the said case that in view of the infirmities present in the sole testimony of the prosecutrix, which was contradicted by the medical evidence as well as by the version given by PW-3 (her aunt in the said case), to whom, the prosecutrix narrated the incident soon after commission of rape, implicit reliance could not be placed upon her sole testimony.

In the matter of ***Vimal Suresh Kamble vs. Chaluverapinake Apal S.P. and another*** reported in ***(2003) 3 S.C.C. 175***, the Apex Court again held that it is true that the conviction of an accused on the basis of the testimony of the prosecutrix alone is permissible, but that is in a case where the evidence of the prosecutrix inspires confidence and appears to be

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natural and truthful. The Apex Court held that the evidence of the prosecutrix in that case was not of such quality, and there was no other evidence on record which may even lend some assurance, short of corroboration that she is making a truthful statement. Therefore, the view taken by the High Court is a possible, reasonable view of the evidence on record and, therefore, warrants no interference.

Therefore, it is clear that though there is no bar in resting the conviction on sole testimony of the prosecutrix, but conviction can be based on such testimony, if the same inspires confidence and appears to be natural and truthful, but where there appears to be infirmities present in the sole testimony of the prosecutrix and she was contradicted by other evidence available on record lacking corroboration to her testimony, a conviction would not be possible on such sole testimony of the prosecutrix.

If we examine the records of the present case, it would appear that the prosecutrix, who was examined as PW-1 has stated in her examination-in-chief that when she was playing near her house, the appellant came to her house and took her in a room (*Kotha*), got her lie down on the straw and thereafter, removed her underwear, closed the doors and said that she will not disclose these things to anybody and he penetrated his private part into her private part, on which, she started weeping. She also states that thereafter, the discharge had taken place and then, the appellant opened the door and the prosecutrix went out

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of the room. She further states that she had narrated the story to her mother, father and to the mother of the accused also.

It has been observed by the Court that this girl was of weak mental constitution, she was also suffering from epilepsy and she was unable to understand the question. For these reasons, the trial Court recorded the evidence of this witnesses without administration of oath. In the cross-examination, the prosecutrix had replied by making gestures and she had admitted that the appellant and his wife, both had went to the place, where she was playing and since she was wearing a torn underwear, the appellant said for purchasing a new underwear. A question was put to her that whether the appellant had asked her as to why she is sitting in a naked condition on road, on which, she had replied in-affirmative. However, she had stated in the cross-examination that the appellant had taken her to *Kotha* (place of occurrence) and pushed her there. It is peculiar to note that when a question was asked to her as to who had gone to lodge the report in the Police Station, the prosecutrix has pointed towards the accused/appellant. On the very second question as to whether she was taken for medical examination, she again answered in negative by making gestures of her head. On another question as to whether the Police had recorded her statement, she had replied that no Police statement was recorded. Last question was asked to her as to whether she had lodged any report in the Police Station, she denied after showing gestures by head.

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If we look into the *Roznamchasana* report lodged by the prosecutrix, it would appear that the prosecutrix has not made any allegation regarding commission of sexual intercourse by the appellant. She had only said that the appellant had said her to unwear her underwear and thereafter, he said to wear it. She also pointed towards her vagina and said about pains in it. On being pointedly asked by the Police Officer as to why the pain is there, she was unable to say anything and thereafter, she said that the appellant had abused her. On this, the officer writing *Roznamchasana* has recorded that nothing was clear; therefore, the Police sent the prosecutrix for medical examination before the First Information Report is lodged and after receiving the medical examination report, First Information Report was lodged (Ex.P/12). The omission about commission of sexual intercourse by the appellant in the *Roznamchasana* report as well as First Information Report lodged by the prosecutrix is certainly fatal to the prosecution.

If the prosecutrix can speak about complete penetration by the appellant in the Court statement on 7/9/1989, then, she should have mentioned the same before the Police also, while the *Roznamchasana* was reduced into writing by the concerned Police Officer on 20/8/1988. It appears to me that since the prosecutrix was unable to say anything about commission of sexual intercourse by the appellant, perhaps therefore, the Police did not record First Information Report at the first instance and kept the matter restricted to the entries made in the *Roznamchasana* and

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when the medical report came to them, and the same did not reveal much more, a query was made by the Police on 23/8/1988 and when the report of the query came that there may be a case of partial penetration, then only, the First Information Report was lodged. These are the infirmities which are coming forward in the evidence given by the prosecutrix regarding complete penetration. Not only this, if the contents of medical report (Ex.P/9) and the statement of lady Dr. (Smt.) M. Purohit is looked into, it would appear that there was no external injury on the body of prosecutrix and there was also no injury on her private parts. However, there was some mark of wound on the right libia, there was some infection in the vagina and some swelling was also there. The prosecutrix was complaining pain at the time of examination. The hymen of the prosecutrix was found intact. The Doctor has opined that there was no penetration in the vagina and the mark of wound was due to infection. Not only this, the Doctor has also opined that the prosecutrix was keeping a weak mental constitution and for which, she had advised her to get examined by Psychiatrist.

The father of the prosecutrix has also been examined as PW-2. He has stated that when he returned back from the fields, the prosecutrix was weeping and she had complained to him that the appellant had abused her. On her complaint, he understood that the appellant had abused her daughter, but when the prosecutrix took him to the *Kotha* and said that she was abused here, then

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only, he could understand that in fact, sexual intercourse was committed against her. On narration of the said story to him, he took the prosecutrix to lodge the FIR to the Police Station after due consultation with the Kotwar and other persons of the village.

It is important to notice this fact here that the prosecutrix has never stated to her father that she was subjected to sexual intercourse by the appellant and in fact, at the first instance, the father only understood that the appellant had abused the prosecutrix, but when she took him to the *Kotha*, then only, he could guess and understand that she was subjected to sexual intercourse.

The evidence of the father, Doctor as well as the contents of the *Roznamchasana* and First Information Report are not corroborating the story of complete penetration set forth by the prosecutrix in her examination-in-chief. In fact, there are infirmities in the evidence of prosecutrix, on which, her testimony does not inspires confidence of this Court and there was a necessity of corroboration in this matter, but her such testimony is not corroborated either by the First Information Report or by the contents of *Roznamchasana* or even by the evidence of father, rather she has been contradicted by these evidence.

In the facts and circumstances of the case, I am of the opinion that her sole testimony was not dependable so as to warrant conviction of the appellant, therefore, conviction based upon the sole testimony of the prosecutrix holding it to be

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| | supported by the evidence of father and medical evidence, as has been held by the Court below is not in accordance with law and same deserves to be set aside.<br><br>In the result, the appeal is allowed.<br><br>The conviction and sentence awarded to the appellant is set aside and he is acquitted of the charges framed against him.<br><br>It is stated that the appellant is on bail. His bail bonds are discharged. He be set at liberty, if not required in any other case<br><br>**Sd/-**<br>**SUNIL KUMAR SINHA**<br>**Judge** | |

Shyna